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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Reallocation of Television Channels ) ET Docket No. 97-157  
60-69, the 746-806 MHz Band )

TO: The Commission

COMMENTS  
OF  
WINSTAR BROADCASTING CORP.

WinStar Broadcasting Corp. ("WinStar"), by its counsel, submits hereby its Comments in response to the Notice of Proposed Rule Making ("Notice"), released in the captioned proceeding on July 10, 1997.<sup>1/</sup> In furtherance whereof, the following is stated:

Background Statement

WinStar is, in here relevant part, an applicant for construction permits for new, full power Television Broadcast Stations on (1) Channel 62 at Arcade, NY (BPCT-960404LB) and (2) Channel 64 at Destin, FL (BPCT-960404LK). Given their channel designations, such applications are within the contemplation of the Notice which in principal part looks toward the

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<sup>1/</sup> FCC 97-245, adopted July 9, 1997; Federal Register, Vol. 62, No. 147, pp. 41012, et seq., July 31, 1997.

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reallocation of the spectrum encompassing television channels 60-69 and, in part, seeks comment and suggestions as to whether some or all of the television applications falling within the prospectively reallocated spectrum may be maintained and granted consistent with the public interest goals underlying the Commission's reallocation proposal and, if so, how that may best be achieved.<sup>2/</sup>

WinStar does not here object to the proposal generally to reallocate the spectrum in question to public safety and/or the other uses described in the Notice. It respectfully submits, however, that certain of the pending television applications contemplated by the Notice plainly can, and should be, accommodated consistent with the achievement of the public interest goals described in the Notice as well as the equally important public interest goal of providing new television broadcast services to the public. Thus, it will be shown hereinbelow that:

- There is no record warrant for simply dismissing as a class those now pending applications for new television facilities on channels 60-69;
- There are many communities throughout the nation -- including the two proposed to be served by the WinStar applications here directly in question -- where, by reason of their location, no concern as to undue impact upon the public safety and other uses of the relevant spectrum is reasonably presented;

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<sup>2/</sup> The WinStar applications in question are presently mutually exclusive with other applications for the same facilities and are thus subject to the comparative proceedings "freeze" attending the Court's decision in Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993). It is presently contemplated, however, that there will be timely submitted an agreement among all of the competing applicants in each market looking toward the removal of the extant mutual exclusivity and with a view to commencing broadcast operations in each market at the earliest feasible time following such approvals. Such settlement submissions are intended to be made prior to February 1, 1998, consistent with the enabling provisions of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) and related new Section 309 (1) of the Communications Act of 1934.

- To the extent that the Commission may nonetheless perceive such undue impact as to WinStar's applications or, indeed, any others in the Channel 60-69 applicant class, it should specifically provide the affected applicants a reasonable and timely opportunity to amend their applications to a channel below the Channel 60-69 grouping;
- If, in the final analysis, a given application in the affected class cannot now be accommodated as proposed above within the confines of the Notice's proposal and related, extant DTV allotment policies, the Commission should specially accord such applicants preferred status with respect to maintaining their applications and in a manner similar to that now provided as to the LPTV service.

The foregoing points are discussed, in order, below.

#### Dismissal of the Subject Applications As a Class is Not Warranted

In substantial part, the Notice recounts the perceived need to provide additional spectrum for public safety and other non-broadcast uses in the overall public interest. Incident to the proposal to reallocate the Channel 60-69 grouping for those purposes, the Notice also appropriately inquires as to whether and if so, how pending applications for Channels 60-69 might be accommodated consistent with such general reallocation. (Id., Para. 22). Further to that general inquiry, the Notice specifically seeks comment as to whether the subject applications should simply be dismissed as a class without reference to other considerations. (Id.).

Although WinStar acknowledges the need for additional spectrum to satisfy the public safety and other needs in question -- and assumes, arguendo, that such needs may most efficiently be satisfied within the spectrum in question -- it respectfully submits that there is no record warrant for now summarily excluding any and all newly proposed standard

television broadcast operations in that universe. Such a course would be overly broad and does not properly tailor a solution to the purpose of recovering and protecting spectrum for public safety use.

Thus, in the first instance, the class in question is relatively small when viewed on a nationwide basis.<sup>3/</sup> As well, and as discussed below, it is clear that at least some of such applications cannot reasonably conflict with the Commission's overall policy goal respecting public safety and other uses.

Given just the foregoing considerations, the Commission should eschew the notion of summarily dismissing the applications in question. Although such action may hold facial attraction, it would at best constitute an expedient inconsistent with the Commission's underlying mandate reasonably to provide for maximally feasible services to the public.<sup>4/</sup>

The WinStar Applications in Question Do Not Conflict With the  
Achievement of the Policy Goals Underlying the Notice

The Notice itself properly acknowledges the possibility, if not the likelihood, that certain of the pending television applications for Channels 60-69 are for communities which, by reason of their location and other considerations, may reasonably be accommodated consistent with public safety and other uses of the relevant spectrum. Thus, the Notice inquires "... should we dismiss only those applications and allotment petitions in major

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<sup>3/</sup> The Notice indicates that a maximum of 33 proposed stations are involved nationwide (Notice, Para. 21). Excepting the "freeze" sub-class, it follows that the number of newly proposed applications now otherwise grantable are for less than 33 stations nationwide. The Notice also acknowledges that Channels 60-69 are now "... relatively lightly used for full service television operations." (Notice, Para. 2).

<sup>4/</sup> That mandate appears to be recognized in the Notice, i.e., "It is our purpose to accommodate as broad a range of services as technically feasible ..." (Para. 15).

metropolitan areas where additional spectrum for public safety is most needed, and which are precluded by the 1997 TV freeze?'. (Id., Para. 22).

Accepting that there is in fact a greater need for additional public safety spectrum in the "major metropolitan areas," it follows that there is less need therefor in other areas. The WinStar applications here in question exemplify those in such other areas and which, on their face, may reasonably be accommodated in the overall public interest. Thus, both applications are for relatively small communities and in areas not subject to the TV freeze.<sup>5/</sup> There obtains as well the presumption that in such areas there will not only be a lower requirement for additional public safety facilities but less congestion in the relevant spectrum generally.

Providing the first local television transmission services at Arcade and Destin is manifestly in the public interest and can be initiated within the relatively near future. Conversely, there is no demonstrated need for significantly greater public service capacity in such areas over the near term and such expanded requirements as may occur in the future may reasonably be accommodated without precluding the new television services in question. Accordingly, the Commission should provide for the continued maintenance, processing and grant of those applications. Although that may adequately be achieved by specific conditions, the Commission should here also consider the adoption of a rule or policy which provides

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<sup>5/</sup> Arcade, NY, has a population of some 2,200 in a rather sparsely populated area of northwest New York state, more than 30 miles from a major community. Similarly, Destin, FL with a population of some 3,500, is located on a strip of land on the Gulf of Mexico, also more than 30 miles from a major community.

similarly for all pending television applications in the Channel 60-69 grouping which are for communities outside of specified major metropolitan areas.<sup>6/</sup>

The Commission Should in Any Event Provide Any Adversely  
Affected Applicants A Reasonable Opportunity to Amend  
Their Applications

The Notice also inquires as to "... whether we should provide [affected] parties an opportunity to amend their applications or petition proposals to obtain analog or DTV channels below channel 60." (Id., Para. 22). Although, as shown above, that course should not be implicated as to the two WinStar applications in question here, the Commission should in any event provide for such an amendment or petition process as to any pending application in the Channel 60-69 grouping which, for whatever reason, may be deemed by the Commission to be materially inconsistent with the achievement of the policy goals underlying the Notice.

Such a course is commended at the outset by basic fairness and equity. Thus, most of the television applications in the potentially affected class have been on file for more than a year.<sup>7/</sup> As well, the applications themselves represent substantial investments of funds, time and other assets by the respective applicant parties. In a related proceeding involving comparable spectrum reallocation the Commission has properly found that such efforts by even prospective applicants ought be recognized, where feasible,

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<sup>6/</sup> If such an approach is adopted, the Commission should also narrowly define the "major metropolitan areas" presumed to require such protection. Thus, whereas Los Angeles and like areas may be presumed to fall in that category, the same may not necessarily obtain as to even a relatively large but not densely populated mid-western complex which is also not subject to the TV freeze.

<sup>7/</sup> For example, all of the applications for Channel 62 at Arcade, NY, and Destin FL have been pending for at least 17 months.

coincident with the Commission's pursuit of other public interest goals. Thus, in the proceedings leading to the Commission's adoption of the extant DTV Table of Allotments the Commission took specific note of the fact that many parties were then in the process of preparing applications for then-vacant NTSC channels and gratuitously provided an additional 30 days for the filing of such applications despite the prospect that such applications would to some extent fetter the overall DTV allocation process.<sup>8/</sup> Comparable recognition and sensitivity commends provision for appropriate amendments in this proceeding.

Provision for amendment, where an application is found ungrantable otherwise, would also potentially serve the overall public interest in bringing presumably needed television transmission services to the communities in question, as noted hereinabove.

In sum, the Commission should specifically provide that any application in the relevant class may be amended to a conforming channel within a specific time and where such a channel is shown to be available. The Commission should also signal its willingness favorably to consider minor waivers of technical rules to accommodate such channel changes.

**The Commission Ought Provide Maximally Feasible Relief for Adversely Affected Full Power Applicants; Its Expressed Concern for LPTV Operations Is Instructive in That Respect**

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Incident to its recent adoption of the extant DTV Table of Allocations, the Commission properly recognized the potentially adverse affect thereof upon the universe

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<sup>8/</sup> See Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968, 10992-93 (1996).

of Low Power Television (“LPTV”) operations.<sup>9/</sup> While confirming and continuing to impose “secondary” status upon that group, the Commission also adopted rules changes and policies designed to minimize the adverse impact upon LPTV operations. (Id., Para. 142). As basically summarized in the instant Notice, such undertakings included allowance for replacement applications by LPTV operations displaced by new DTV operations, those to be processed on a first-come, first-served, non-competitive basis as well as a variety of technical rules changes intended to offer such operations greater flexibility. (Id., Para. 18). The Commission also recounted its expectation that many LPTV operations on Channels 60-69 may be able to “co-exist” with public service and other new uses in that channel grouping. (Id., Para. 18).

The Notice here ultimately proposes for consideration the option “... to provide some level of accommodation to low power operations in Channels 60-69 until the end of the DTV transition period in the year 2006, in order to give those stations time to relocate to other portions of the spectrum, change transmission channels, seek licensing as primary services, or otherwise modify their operations.” (Id., Para. 20).

WinStar fully supports the Commission’s expressed intent to minimize the potentially adverse impact upon LPTV flowing from the DTV allotment process

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<sup>9/</sup> In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Services, MM Docket No. 87-268, Sixth Report and Order, FCC No. 97-115, released April 21, 1997, Paras. 114 et seq.



generally and to accommodate where feasible LPTV operations on Channels 60-69 in particular. As well, it respectfully suggests that the same level of concern with adverse impact and a related commitment to a broad range of remedies ought plainly be evidenced as to the universe of long-pending, full power applications for Channels 60-69 in direct question here.

Of threshold significance in this respect is the fact that the LPTV universe is a secondary service such that a given LPTV operation, in the event of operational/interference conflicts, must cede to of full power television operation. A pending and officially “accepted” application for a full power television operation is entitled to such priority as to an operating LPTV station. With no intent to demean the significance of the LPTV service generally or to argue for the displacement of such an operation in favor of a full power proposal in the Channel 60-69 grouping, it remains that an application to provide such a full power service is entitled to at least the same level of consideration and related “remedial” undertakings as the Commission has properly accorded the affected LPTV universe.

Given the foregoing, the Commission should in this proceeding also provide for the maximally feasible accommodation of pending full power applications for channels 60-69 consistent with its underlying goals respecting public safety and other uses of that spectrum. Incident thereto, it should as a minimum make provision for -- as it has with respect to the LPTV universe -- timely amendments to relocate to other portions of the

spectrum, other appropriate changes in transmission channels, and conforming modifications generally.

Respectfully submitted,

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